No. 21002

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD R. CLEMENTS,

Appellants,

vs.

PASADENA FINANCE COMPANY, a California corporation, *et al.*,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellant's Statement of Case.

There appears to be no disagreement as to the material facts as set forth in appellant's and appellee's briefs.

ARGUMENT.

Points I and II of Appellant's Brief and Points II and III of Appellee's brief present both sides of the case and Appellant will not reiterate any points previously made.

The Court should note however, that the three (3) cases cited by Appellee, to wit:

Union Oil Co. v. Domengeaux, 30 Cal. App. 2d 266, 272-273 (1939);

Reichardt v. Reichardt, 186 Cal. App. 2d 808, 809-810 (1960);

Ley v. Dominguez, 212 Cal. 587 at 594 (1931).

are all case interpreting statutes which require an act to be done *within* a certain time period.

In *Union Oil Co. v. Domengeaux (supra),* the statute required an action to be brought "within one hundred eighty days". In *Reichardt v. Reichardt (supra)* the issue was whether an application for modification of an alimony award was filed within three years, of the entry of award. In *Ley v. Dominguez (supra)* the issue was whether certain referendum petitions were filed within 30 days of the date of the publication of a city ordinance.

Appellee has cited no case interpreting a statute which requires a certain minimum time period to expire *before* an act may be done.

I.

If the Sale and Lease Back Transaction Occurred One Day Prematurely Then the Security Interest of Appellee Was Not Perfected Until the Machinery Was Repossessed.

(a) Appellee's Cases Are Not Applicable.

In Point IV of the Reply Brief, the Appellee is raising a point not mentioned in Appellant's Opening Brief. Discussion was omitted because the District Judge based his decision solely upon the issue of the ten day notice and stated that other grounds were not necessary to sustain the Motion To Dismiss the Complaint.

The Appellee relies heavily upon the language in the case of *In re Aerocolor, Inc.*, 236 Fed. Supp. 94 (D.C. 1964). That case was reversed August 3, 1965 by this Court, under the heading, *Martin v. Crocker-Citizen's National Bank*, 349 F. 2d 580 (1965), and is no longer the law.

Similarly Appellee's citations of *In re Lundgren Wood Products*, 198 Fed. Supp. 908 (1961) and *Dersch v. Thomas*, 138 Cal. App. Supp. 785 (1934), are inapplicable since those cases deal with entirely different facts, and subsection (h) of Civil Code Section 3440 is not even involved. More importantly, Section 60a(2) and (3) of the Bankruptcy Act was not involved.

(b) Appellant Need Not Prove the Existence of an Actual Creditor.

Appellee's argument that Appellant must prove actual prejudice to a creditor to invalidate the sale and lease-back transaction, demonstrates a misconception of the theory of Appellant's case. Appellant has sought to recover the value of the repossessed property under the theory that repossession by the Appellee within four months of bankruptcy is a preferential transfer voidable pursuant to Section 60(a) of the Federal Bankruptcy Act (Title II, U.S.C. Sec. 96). Section 60(a)-(2) provides in part:

> ". . . a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. . . ."

and Section 60(a)(3) provides in part:

> "The provisions of paragraph (2) shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property. . . ."

These sections were passed in 1938 to do away with the necessity of the trustee proving the existence of an actual creditor, in determining whether a lien is perfected. The trustee must prove the existence of an actual creditor to attack a transfer only pursuant to Section 70(e) of the Bankruptcy Act (Title II, U.S.C. 110 e).

A transfer may not be voidable by a trustee pursuant to Section 70(e) because of the non-existence of actual creditor, and still be unperfected within the meaning of Section 60 a(2) and (3).

Miller v. Sulmeyer, 263 F. 2d 513 (9 C. A. 1959);

Collier on Bankruptcy, Vol. 3, Sec. 60.38, pp. 952-953.

(c) Actual Prejudice Is Immaterial.

Appellee apparently agrees that the purpose of Civil Code Sections 3440h(2) and 3440.1 are the same (Appellee's Br. p. 4, first para.).

This Court in construing the purpose and effect of a failure to follow the prescribed procedure in Civil Code Section 3440.1, stated the following in *Bumb v. United States,* 276 F. 2d 729 (1960).

> Appellee further argues that since it does not appear in the record that any of the creditors of Dinsmore Equipment Company appeared at the office of the Small Business Administration on November 21, 1956, it must be assumed that none of them was misled by the manner in which the consideration was paid. *In our view such latter fact is immaterial.* Page 735 (emphasis added).

Conclusion.

The failure to give the requisite 10 day notice of Civil Code Section 3440a(2) rendered the sale and leaseback security arrangement unperfected within the meaning of Section 60(a)(2) and (3) of the Bankruptcy Act. The security interest of the Pasadena Finance Company was therefore not perfected until it repossessed the bankrupt's equipment and goods within the four months immediately preceding bankruptcy and thus appellant should be allowed to establish a preferential transfer voidable as to the general creditors of the bankrupt estate.

Respectfully submitted,

RICHARD M. MONEYMAKER,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. M. MONEYMAKER